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National security

The leaker and the law

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For over 200 years American government has survived without an Official Secrets Act, or any similar statutory armour, to keep civil servants from revealing information vital to national security or simply embarrassing to the administration of the moment. To be sure, there are espionage laws, but they are rarely invoked. There is also a variety of more potent informal sanctions against civil servants who talk too freely: unfavourable transfers, demotion and even outright dismissal. These informal methods which the bureaucracy may apply to underlings who call attention to instances of corruption and waste, have proved effective; one blighted career can serve as a warning to a dozen other would-be "whistleblowers".

In recent weeks, however, the Carter administration, in spite of Mr Carter's own campaign promises of open government, has taken several long strides in the direction of formal, legal sanctions against "leakers" in the civil service.

Last month Mr Ronald Humphrey and Mr David Truong were convicted of supplying information from state department documents to the Vietnamese. The chief charge was straightforward; the two men had violated the espionage law. But there was another, little-noticed, charge of which they were also convicted: they had stolen government property in the form of information. According to Judge Albert Bryan, presiding, it did not matter whether the original document remained in government files; information is itself property, "apart from the document on the sheets of paper themselves".

Stated so boldly, this legal theo would appear to apply to any kind government information, to data abo corrupt procurement practices or wast ful expenditures no less than to defen secrets. And, adds Mr Mark Lynch of the American Civil Liberties union, journalists who receive such "stolen property" could, at least theoretically, be considered accessories to the crime.

In the second case, Mr Frank Snepp, the former CIA agent whose book "Decent Interval" described what he called the "botched" evacuation of Vietnam in 1975, was held by a federal judge to have committed "a wilful breach of the highest public trust". This was the CIA's first important action against an agent-turned-author since 1974, when Mr Victor Marchetti and Mr John Marks were forced to delete disclosures of classified information from their book "The CIA and the Cult of Intelligence". Mr Snepp's book, however, contained no classified information, nor did the government allege that it did.

The government did claim that Mr Snepp had violated a contract—the employment agreement signed by all new CIA employees, which requires them to submit for prepublication screening any manuscripts involving the agency. Mr Snepp did not deny publishing without agency approval, but contended that the agreement applied only to classified information.

This is where the legal innovation came in. The government claimed that in addition to the agreement Mr Snepp had a "fiduciary duty", a legal obligation, not to publish sensitive information acquired as a function of his having occupied a position of trust. The concept of fiduciary duty is most frequently applied in cases of disclosure of a company's trade secrets, and even there applies only to actual secrets; its introduction into a case like Mr Snepp's is both unprecedented and an expansion of the existing notion of the law.

In a recent New York Times article on the Humphrey-Truong case, Mr Anthony Lewis, an expert in this area of the law, suggested that inasmuch as the government did not really need the stolen property argument in order to secure a conviction, it could be that prosecutors were using the occasion to test new legal weapons for future use.